

ROY M. MILLER, JR.

IBLA 80-849

Decided January 6, 1981

Appeal from decision of the Nevada State Office, Bureau of Land Management, rejecting Indian allotment applications. N 30552 and N 30554 through N 30556.

Affirmed.

1. Indian Allotments on Public Domain: Generally

No rights of Indians are violated because public lands have been withdrawn from settlement and must be classified pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 (1976).

2. Applications and Entries: Generally--Indian Allotments on Public Domain: Generally

An application for an Indian allotment filed pursuant to sec. 4 of the General Allotment Act, as amended, 25 U.S.C. § 334 (1976), which is not accompanied by either the certificate of eligibility required by 43 CFR 2531.1(b) and (d) or the petition for classification required by 43 CFR 2531.2 may be rejected.

APPEARANCES: Roy M. Miller, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On July 18, 1980, Roy M. Miller, Jr., filed four applications for Indian allotments pursuant to section 4 of the General Allotment Act (Act) of February 8, 1887, 24 Stat. 389, as amended, 25 U.S.C. § 334 (1976). The appellant requested an allotment of 640 acres of land

located in the SE 1/4 sec 17, SW 1/4 sec 16, and the NW 1/4 and SW 1/4 sec. 21, T. 23 S., R. 59 E., Mount Diablo meridian. The applications were designated by serial numbers N 30552 and N 30554 through N 30556. 1/

On July 21, 1980, Bureau of Land Management (BLM) returned appellant's applications with the following explanation:

1. Each application must be accompanied by a petition for classification which must be signed and dated.
2. Regulations require that any person filing an application for Indian Allotment, under the Act of Feb. 8, 1887, must first obtain from the Commissioner of Indian Affairs a certificate showing that he or she is Indian and is entitled to an allotment (43 CFR 2531.1(b)).
3. The application must be executed within 10 days of receipt in this office. (43 CFR 1821.2-2(a)).

In his statement of reasons on appeal appellant asserts in effect that the certificate of eligibility and the petition for classification are unnecessary and that allotment rights should accrue by virtue of his Indian descent, United States citizenship, and Indian treaty rights. In addition to citing several statutes which appellant finds to be applicable he also cites "Chootes v. Trapp, 224 U.S. 413 (1912)," 2/ and the Fifth Amendment to the United States Constitution.

[1, 2] Section 4 of the Act authorizes the Secretary of the Interior to issue allotments to Indians where they have made settlement on available public lands. Thurman Banks, 22 IBLA 205 (1975). Regulation 43 CFR 2531.1(b), promulgated pursuant to the Act, requires a showing of eligibility as follows:

Any person desiring to file application for an allotment of land on the public domain under this act must first obtain from the Commissioner of Indian Affairs a certificate showing that he or she is an Indian and eligible for such allotment, which certificate must be attached to the allotment application. Application for the certificate must be made on the proper form, and must contain information as to the applicant's identity, such as thumb print, age, sex, height, approximate weight, married or single, name of the Indian tribe in which membership is claimed, etc., sufficient to establish his or her identity with that of the

1/ The maximum area which can be allotted under the Act is 160 acres. See 43 CFR 2530.0-8(a). Appellant apparently has applied for 480 acres for himself and 160 acres on behalf of his minor daughter.

2/ We note that the Indian allotment case reported at 224 U.S. 412 is Heckman v. United States.

applicant for allotment. Each certificate must bear a serial number, record thereof to be kept in the Indian Office. The required forms may be obtained as stated in § 2531.2(b).

The appellant did not submit the required certificate. Instead, in the application blank space specifically requesting the number of the certificate issued by the Bureau of Indian Affairs (BIA), appellant entered, "8 U.S.C. § 1401 USCA Const. Amend. 5." This response does not comport with the requirements. Neither the cited statute, which refers to United States citizenship, nor the Constitution, has any relevance to the propriety of the BLM's request for the data sought.

Appellant referred again to 8 U.S.C. § 1401 (1976) in response to the application question asking for a petition for classification. This petition is necessary where lands have not yet been classified by BLM as suitable for this kind of disposition. As 43 CFR 2531.2 provides:

§ 2531.2 Petition and applications.

(a) Any person desiring to receive an Indian allotment (other than those seeking allotments in national forests, for which see Subpart 2533 of this part) must file with the authorized officer, an application, together with a petition on forms approved by the Director, properly executed, together with a certificate from the authorized officer of the Bureau of Indian Affairs that the person is Indian and eligible for allotment, as specified in § 2531.1(b). However, if the lands described in the application have been already classified and opened for disposition under the provisions of this part, no petition is required. The documents must be filed in accordance with the provisions of § 1821.2 of this chapter.

The petition and the statement attached to the application for certificate must be signed by the applicant.

(b) Blank forms for petitions and applications may be had from any office of the Bureau of Indian Affairs, or from land offices of the Bureau of Land Management.

On each allotment application form the applicant checked "no" in response to questions concerning whether the land was occupied by the applicant and whether there were improvements on the land. The applicant referred to a posted notice recorded in a book (giving a number), and referred to an attached form. The attached forms were identical except for written additions and assert rights based upon various statutes relating to Indians and to their citizenship rights. The applicant alleges that he is an Indian of Cherokee descent and gives an address in the State of Texas.

There is no information to show that the applicant had, in fact, physically settled upon the lands applied for, and, particularly, that any alleged settlement was prior to withdrawal of the lands from settlement by Indians qualified under the General Allotment Act. Also, there is nothing in the record to show that the lands have been classified for Indian allotment. Therefore, the petition for classification to open the lands for such settlement is required. It is well established that no rights of Indians are violated by the withdrawal of public land from settlement and the requirement that such lands be classified pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 (1976), before the public lands can be allotted to an Indian under section 4 of the General Allotment Act. Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012. Nor is there a violation of any rights if an allotment application is denied where land is not classified for allotment. Finch v. United States, supra. Therefore, the BLM office properly required appellants to file the petition for classification.

Any question of "Treaty" rights is irrelevant here. Under section 4 of the General Allotment Act, Indians residing on reservations are not eligible for an allotment of public land. See Pallin v. United States, supra. It is for this and additional reasons that the Indian must provide the certificate of eligibility from the BIA. Their applications cannot be adjudicated and are subject to rejection unless these preliminary procedural requirements are met. Tammy Lou Ricker Smith, 49 IBLA 251 (1980); Geneiva Nell Meston Smith, 48 IBLA 199 (1980).

Nothing that the appellant has stated obviates the need to comply with the regulations implementing section 4 of the General Allotment Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing

Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

